END OF THE ROAD FOR BREACH OF PROMISE CLAIMS? *CLOETE V MARITZ* 2013 (5) SA 448 (WCC) AND *CLOETE V MARITZ* SAFLII [2014] ZAWCHC 108

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1 INTRODUCTION

In the discussion which follows, we consider two Western Cape High Court judgments by Henney J. They were delivered in response to breach of promise claims involving the same two parties. As will be shown, over the past decade courts have expressed views that the breach of promise remedy has become archaic and perhaps needs to be discarded. In the two *Cloete v Maritz* judgments[3], Henney J strongly endorsed these views. Our purpose is to establish what scope, if any, now remains for bringing breach of promise claims in the future. Our evaluation is divided into four parts. First, as background we provide a brief overview of relevant law and particularly cases which influenced Henney J. Second, we explain the facts and judgment in *Cloete* 2013 in which Henney J dealt with a special plea contending that the breach of promise remedy no longer forms part of South African law. Third, we explain the facts and judgment in *Cloete* 2014, wherein the female plaintiff put forward an alternative claim based on a universal partnership with her ex-fiancé. In the final part of our discussion, we consider what scope remains for breach of promise claims and whether universal partnership claims can serve as an appropriate substitute.

2 BACKGROUND

Traditionally, in line with leading decisions of our courts such as *Guggenheim v Rosenbaum* 1961 4 SA 21 (W) and *Bull v Taylor* 1965 4 SA 29 (A), breach of promise claimants had two possible remedies. The first was a delictual remedy if the other party had intentionally terminated the engagement in a hurtful way that infringed the dignity of the claimant. Secondly, a breach of promise contractual remedy permitted claims for negative damages (actual expenses and losses) already incurred in anticipation of the non-transpiring wedding

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and marriage. It also permitted damages based on prospective or future financial losses, provided these could have been anticipated following the intended marriage.[4]

However, since 2008 the courts have begun to express increasing doubts about the action for breach of promise to marry, and in particular prospective loss damages. These doubts arose from judicial concerns about changes in public policy and the *boni mores* of society. The first manifestation came in *Sepheri v Scanlan*[5]where Davis J commented:

> "… our law requires a reconsideration of this particular action. It appears to place the marital relationship on a rigid contractual footing and thus raises questions as to whether, in the constitutional context where there is recognition of diverse forms of intimate personal relationships, it is still advisable that, if one party seeks to extract himself or herself from the initial intention to conclude the relationship, this should be seen purely within the context of contractual damages."[6]

However, Davis J found himself unable to hold that the breach of promise action had been abolished under South African law. He concluded:

> "However, I have to accept that this is not the existing legal position. Neither Mr *Steenkamp*, who appeared on behalf of defendant, nor Ms *Davis*, who appeared on behalf of plaintiff, argued in this fashion, nor in my own research have I found support that this action is no longer part of South African law… Arguably, the highest courts may consider the position differently. It is obviously a matter for legislation rather than judicial engineering by trial courts."[7]

Two years later the doubts expressed by Davis J in *Sepheri* were supported by the SCA in *Van Jaarsveld v Bridges.*[8] In this matter Harms DP stated:

> "I do believe that the time has arrived to recognise that the historic approach to engagements is outdated and does not recognise the *mores* of our time, and that public policy considerations require that our courts must reassess the law relating to breach of promise."[9]

[4]See Heaton *South African Family Law* 3 ed (2010) 11-12.
[5]2008 1 SA 322 (C).
[6]*Sepheri v Scanlan* 330-331 I-J.
[7]*Sepheri v Scanlan*331 B-C.
[8]2010 4 SA 558 (SCA).
[9]*Van Jaarsveld v Bridges SCA* 560G-561B.

He also suggested that it made no sense to enter into marriage if the financial consequences of an engagement were the same or greater than those of marrying.[10] However, these remarks were *obiter* since a decision on the future of the breach of promise remedy was not needed for purposes of the case.[11]

The next reported matter involving a previously engaged couple was *Ponelat v Schrepfer.*[12] Here, a new remedy was found to replace prospective damages as a means for gaining substantially from the assets of a person in breach of promise. The parties had lived together for sixteen years and become engaged. The female plaintiff, at the request of her fiancé, had given up her career to help him run his business. She also served as a housewife. After the defendant terminated their relationship, she claimed half of his assets on the basis that a tacit universal partnership had been established between them. In accepting that there was a universal partnership and awarding 35% of the defendant's assets, the court noted that he had sometimes stated that what he owned also belonged to the plaintiff.[13]

Soon afterwards, in *Butters v Mncora*[14] the SCA greatly extended eligibility for the universal partnership remedy in cases of long-term cohabitation. It awarded it to a jilted woman who had made almost no financial contributions and had not assisted in her fiancé's business. The majority of the court treated her child rearing and housewife duties as constituting sufficient contributions.[15] However, she received only R25,000 as delictual damages for hurt feelings, even though the breakup was caused by her fiancé being sexually unfaithful.[16]

As will be seen, the approaches taken in the *Sepheri, Van Jaarsveld, Ponelat* and *Butters* decisions influenced Henney J in the two *Cloete* judgments.

3 THE 2013 *CLOETE* JUDGMENT

3 1 The Facts

In February 1999 the defendant, Maritz, proposed marriage to the plaintiff, Cloete, which offer she accepted. However, by May 2009 they were still not married. The defendant then

[10] *Van Jaarsveld v Bridges SCA* paras 22 and 53.
[11] *Van Jaarsveld v Bridges SCA* para 3.
[12] 2012 1 SA 206 (SCA).
[13] *Ponelat v Schrepfer* para 23.
[14] 2012 4 SA 1 (SCA).
[15] *Butters v Mncora* para 311.
[16] *Butters v Mncora* para 3B (A decision of the court *a quo*).

repudiated the engagement "in foul and contumelious language."[17] In subsequently suing him for breach of promise, the plaintiff claimed R6 050 000 as prospective loss damages. She based this on the lifestyle she had enjoyed while cohabiting with him and on the average life expectancy of a female her age. She also brought a delictual claim for injury to her dignity occasioned by the contumelious manner in which the repudiation was conveyed.[18] In response, the plaintiff raised a special plea that breach of promise is no longer a legally valid cause of action in South Africa.[19] In so doing, the defendant relied upon the views expressed in *Sepheri* and *Van Jaarsveld*.

3 2 The Judgment

In considering the special plea in the *Cloete* (2013) case, Henney J cited with approval a comment of Harms DP in *Van Jaarsveld* that at the time of becoming engaged, parties usually give little thought to which financial consequences they would choose to apply to their future marriage.[20] He reasoned further that engagement should be treated as no more than a *spatium deliberandi*, a time to get to know each other better and thereafter to decide whether to marry.[21] Henney J gave particular weight to an opinion expressed in *Van Jaarsveld* concerning inappropriateness of awarding prospective damages. He quoted the following *dictum* of Harms DP:

> "Prospective losses are not capable of ascertainment, or are remote and speculative, and therefore are not proper to be adopted as a legal measure of damage. They depend on the anticipated length of the marriage and the probable orders that would follow on divorce, such as forfeiture and the like. I do not believe that courts should involve themselves with speculation on such a grand scale by permitting claims for prospective losses."[22]

Henney J acknowledged that these remarks were *obiter* and therefore not binding on him. However, the views expressed in *Van Jaarsveld* and *Sepheri* reflected a paradigm shift in the views of judges and legal writers concerning continued validity of the breach of promise action, making this issue ripe for reconsideration.[23]

[17] *Cloete 2013* para 3.
[18] *Cloete 2013* para 7.
[19] *Cloete 2013* para 8
[20] *Cloete 2013* para 18.
[21] *Cloete 2013* para 19.
[22] *Cloete 2013* para 10.
[23] *Cloete 2013* paras 40-42.

In proceeding to evaluate the merits of the action, Henney J decided that the essential question was whether its common law basis remained in consonance with s 39(2) of the Constitution.[24] He explained that a two-step test to evaluate this was necessary as follows:

> "The first stage is to consider whether the existing common-law, having regard to the s 39(2) objectives, requires development in accordance with these objectives. This requires a reconsideration of the common-law in the light of s 39(2) of the Constitution and involves a careful examination of the existing principles which underpin the common-law rule and a comparison thereof with the key principles of the Constitution. If this enquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the s 39(2) objectives."[25]

Henny J reasoned that society's *boni mores* or public policy are dynamic and are given meaning by the constitutional values of human dignity, equality and freedom as entrenched in the Bill of Rights. Where the common law is no longer in alignment with the current *boni mores* of society, then a trial court is entitled to deviate from the *stare decisis* rule.[26] Referring again to *Van Jaarsveld*, he noted that although the comments of the SCA concerning breach of promise being outdated were *obiter*, they were unanimous and constituted "strong persuasive precedent."[27] There was therefore sufficient authority for the proposition that claims based on unlawful termination of engagements were neither reflective of the current *boni mores* of society nor of constitutional values. Consequently, recognition of claims in respect of a defendant's failure to meet a promise to marry in purely contractual terms was untenable.[28]

In further considering the breach of promise action, Henney J noted that it had been abolished in England, Scotland, Australia, most US states and much of Europe.[29] He cited with approval comments by Sinclair[30] that the action gives "opportunity for claims of a 'gold-

[24]The Constitution of the Republic of South Africa Act 108 of 1996.
[25]*Cloete 2013* para 43, citing *Petersen v Maintenance Officer, Simon's Town Maintenance Court, and Others* 2004 2 SA 56 (C) (2004 2 BCLR 205), 274G-275C.
[26]*Cloete 2013* paras 44-45.
[27]*Cloete 2013* para 47.
[28]*Cloete 2013* para 48.
[29]*Cloete 2013* para 50.
[30]*The Law of Marriage* Volume 1 (1996) 313-4.

digging' nature, and that the stability of marriage is so important to society that the law should not countenance rights of action the threat of which may push people into marriages which they would not otherwise undertake."[31]

Henney J concluded that a significant change in public policy and morality had occurred. A party who simply had a change of heart should nowadays generally be able to withdraw from an engagement without being considered guilty of breach of promise. Such party should be protected from contractual consequences such as having to pay prospective damages.[32] The court then held formally that breach of promise claims for prospective damages are no longer permissible under South African law.[33]

4 THE 2014 *CLOETE* JUDGMENT

4 1 The Facts

After the rejection of her claim for prospective damages, the plaintiff amended her particulars of claim. She contended that a universal partnership had been established between herself and the defendant. In terms of this, she claimed half his assets.[34] She also significantly reduced her damages for hurt feelings from R250,000 to R25,000.[35] The parties again appeared before Henney J. In his judgment he noted salient facts pertaining to the fifteen year relationship between the parties.[36] He found that the plaintiff had assisted the defendant both financially and practically in the purchase and running of numerous businesses. These included hair salons, a farm, a clothing business, an investment property in Oranjemundt, and a restaurant. This assistance had been provided during 1994-2000 whilst the defendant worked full-time for De Beers Mines, leaving the running of the businesses mainly to the plaintiff.[37]

In October 2000 the defendant asked the plaintiff to marry him and they concluded an antenuptial contract. However, the proposed marriage did not eventuate because the defendant persistently postponed it.[38] The parties purchased a house in Cape Town in 2001. Although the house (like all of the businesses) was registered in the defendant's name, he

[31] *Cloete 2013* para 51.
[32] *Cloete 2013* paras 55-56.
[33] *Cloete 2013*para 56.
[34] *Cloete 2014* 2 para 4.
[35] *Cloete 2014* para 6.
[36] *Cloete 2014* para 12.
[37] *Cloete 2014* paras 13-22.
[38] *Cloete 2014* para 23.

assured the plaintiff that it was common property and would be a retirement home for their old age.[39] They thereafter purchased more businesses. Again, the plaintiff was closely involved in the running of these at the defendant's request.[40] In the period 2007-2009 they continued joint business activities and lived together on a farm in Namibia where the plaintiff took on the responsibilities of a housewife.[41]

In March 2009 they moved back to the Cape Town house. Shortly afterwards, the defendant informed the plaintiff that he was not interested in continuing their relationship and left her. In subsequent communications he informed her that he had somebody else in his life and was no longer interested in her. The plaintiff became hysterical and begged him to reconsider. She reminded him about what they had achieved and acquired together. She pointed out that she owned none of the business enterprises she had managed and was therefore completely financially dependent on him.[42] These entreaties were unsuccessful and on 5 December 2009 the defendant married another woman.[43]

4 2 The 2014 Judgment

In considering the plaintiff's claim that she and the defendant had tacitly established a universal partnership during their time together, Henney J found it significant that the defendant had referred to the co-managed businesses and properties as "*ons besighede*" in correspondence with the plaintiff. This understandably caused her to believe that they were their joint possessions and that she would in future enjoy their benefits.[44] The defendant had even referred to the plaintiff in correspondence with third parties as his business partner, for example, on an FNB banking facility application.[45] The court then turned its attention to whether or not the plaintiff had satisfied the elements for proof of existence of a universal partnership. It described the three essential requirements for this as follows:

> "Firstly, each of the parties must bring something into the partnership or must bind themselves to bring something into it, whether it be money, or labour, or skill. Secondly, the partnership business should be carried on for the joint benefit of both parties. Thirdly, the object of such partnership should be to make a profit."[46]

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[39] *Cloete 2014* para 25.
[40] *Cloete 2014* paras 26-27.
[41] *Cloete 2014* paras 29-30.
[42] *Cloete 2014* paras 31-33.
[43] *Cloete 2014*para 49.
[44] *Cloete 2014*paras 35-7, 41 and 44.
[45] *Cloete 2014* paras 82-83.
[46] *Cloete 2014* para 90.

In applying these requirements, it could not be disputed that the plaintiff had made significant contributions to the business relationship. Both parties had benefited from the relationship because it allowed acquisition of many assets. It was noteworthy that the plaintiff's active involvement in the development and expansion of the businesses rendered her role far more than that of a passive participant or housewife. This was surely evidence of a common objective: the making of profit.[47] Henney J therefore concluded that the requirements for existence of a universal partnership between the plaintiff and the defendant had been satisfied.[48] The plaintiff was thus entitled to a 50% share of the value of the assets of that partnership.[49]

In considering the plaintiff's other claim for delictual damages based on hurt feelings and injury to her dignity, Henney J accepted that the defendant had on occasion been physically and verbally abusive.[50] In spite of his delaying the marriage, sometimes using vile and vulgar language and treating her with disrespect, the plaintiff remained loyal to him.[51] Her love and commitment were revealed by the fact that she became hysterical on the night the defendant broke off their engagement and she "even went on her knees to beg him not to do so".[52] It was also relevant that when he left her without assets she was almost at retirement age. Because of her age and lack of any qualifications, she was not able to find work after the breakup.[53] The court stressed that subjective feelings of hurt experienced by a claimant are not relevant. Instead, an objective test must be applied. In terms of this, the conduct of the defendant needed to be measured against what could be regarded as reasonable.[54] In applying this test in respect of the delictual claim for wrongful termination under the *action iniuriarum*, Henney J held that "the conduct of the Defendant, given the circumstances of the case, cannot be regarded as reasonable if tested against the prevailing norms of society. In my view, the conduct of the Defendant viewed objectively is sufficient to sustain an action for *iniuria*."[55]

[47] *Cloete 2014* paras 93-100.
[48] *Cloete 2014* para 110.
[49] *Cloete 2014* paras 100 and 119-120.
[50] *Cloete 2014* paras 42-3, 46.
[51] *Cloete 2014* paras 81 and 112.
[52] *Cloete 2014* para 113.
[53] *Cloete 2014* para 51.
[54] *Cloete 2014* para 114
[55] *Cloete 2014* para 114.

The court then awarded *iniuria* damages of R25,000 in accordance with the plaintiff's reduced claim.[56]

5 SOME CONCLUDING REMARKS

In *Cloete* 2013, the court strongly associated itself with the *dicta* in *Sepheri* and *Van Jaarsveld*, criticising the breach of promise action as archaic and productive of inappropriate consequences. However, although Henney J joined in the negative comments about the action, the only holding he actually reached impacting on its future availability concerned the prospective loss damages aspect. The 2013 judgment is thus mainly significant as the first ruling that the prospective loss remedy is no longer part of South African law and is therefore no longer available to jilted parties. The remaining components of the breach of promise action, namely contractual damages for existing loss and delictual damages for hurt feelings, appeared to remain extant, albeit under a cloud of disapproval.

Henney J's endorsement of the earlier holdings in *Sepheri* and *Van Jaarsveld* is understandable in view of the potential financial prejudice defendants could face from exorbitant prospective damages claims following termination of engagements to persons motivated more by financial greed and opportunism than broken-heartedness. However, in reported cases to date it is hard to find much evidence of such gold-digging opportunism. Instead of the prospective loss claim, in *Cloete* 2014 Henney J followed the *Ponelat* and *Butters* cases in permitting a universal partnership remedy to be used. Whereas 35% of the assets of jilting fiancés had been awarded in the former two cases, in *Cloete* 2014 Henney J awarded as much as 50%. This higher proportion can be explained by a relatively much greater and longer- term involvement of the plaintiff in her fiancé's business affairs as compared with *Ponelat* and *Butters.*

The degree and duration of the plaintiff's involvement in her fiancé's business affairs in *Cloete* was exceptional. It was therefore easy for Henney J to choose universal partnership relief over prospective damages relief. However, the rejection of the latter as no longer available in South African law may have an unfortunate impact on some future jilted parties who are financially disadvantaged. The universal partnership requirements of a profit motive and contribution to a profit-making enterprise may have a difficult fit when applied to typical

[56] *Cloete 2014* para 115.

engagement relationships. These are usually characterised more by romantic than business involvement. It is true that in *Butters* the SCA interpreted the requirements extremely broadly by allowing a combination of housekeeping and child-rearing duties to count as a sufficient contribution. However, many betrothed parties, and particularly those who are not cohabiting, will not be able to show the kind of contributions made in *Ponelat, Butters, Sepheri, Van Jaarsveld* or *Cloete.* Concern then arises for vulnerable parties, usually women, who have given up career opportunities on a promise of marriage and then been strung along for many years before being jilted. They are likely to have suffered significant financial prejudice but may not be able to prove the requirements of a universal partnership.[57] This is especially a difficulty for women who are older and unskilled because their chances of finding employment or a new partner may be greatly reduced.

It might be contended that the preservation of the delictual damages aspect of the breach of promise remedy in *Cloete* provides a solution to the problematic scenario just described. As we have noted, despite his strictures about the breach of promise remedy in *Cloete* 2013, Henney J did award R25,000 as *iniuria* damages for hurt feelings in *Cloete* 2014. The latter award confirms that at least this part of the breach of promise remedy remains available. It would thus not be correct to conclude that the *Cloete* judgments are authority for the proposition that the breach of promise remedy has been entirely removed from South African law. Of concern, however, is the low amount of R25,000 awarded. It must be conceded that the plaintiff herself dropped her delictual claim down substantially after her lack of success in *Cloete* 2013. As is clear from the findings of the court in *Cloete* 2014, besides stringing the defendant along for many years, the defendant had behaved callously and insultingly towards her. Further relevant factors were the plaintiff's age, length and depth of her commitment to the relationship, and severity of her emotional suffering. Rather than commenting that a much more substantial *iniuria* damages award would be commensurate in such circumstances, Henney J simply considered R25,000 to be appropriate since that was the amount awarded in *Butters*.[58] In discounting the extent of emotional harm suffered in an intimate emotional relationship, he was also following the so-called objective approach taken in *Van Jaarsveld*. However, as pointed out by Bonthuys in a criticism of *Van Jaarsveld*, treating emotional harm by a fiancé as if it had been inflicted by a stranger in a purely business relationship creates a

[57]Barratt "Private contract or automatic court discretion? Current trends in legal regulation of permanent life-partnerships" 2015*Stellenbosch Law Review* 110 118.
[58]*Cloete* 2014 paras 121-122.

danger of underestimating emotional damage.[59] As noted by Sachs J, there is a gender dimension to termination of long-term heterosexual relationships because it is usually the woman who is most disadvantaged.[60] It is to be hoped that the courts will keep this in mind when considering future claims by female plaintiffs arising from breaches of promise.

[59]Bonthuys "Developing the common law of breach of promise and universal partnerships: rights to property sharing for all cohabitants?" 2015 *SALJ*76 83-84.

[60] In *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) para 225 he commented that "[t]he law cannot ignore the fact that lack of resources has left many women with harsh options only. The choice has been between destitution, prostitution and loneliness, on the one hand, and continuing cohabitation with a person who was unwilling or unable to marry them on the other".